Supreme Court, U.S.
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No. 01-1481

IN THE

Supreme Court of the United States

SUSAN M. WEICHERT,

Petitioner,

v.

JOHN W. KRUK, Treasurer of County of Oswego,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the underlying proceeding properly commenced by filing so as to confer *in personam* jurisdiction over the Respondent and subject matter jurisdiction before New York State Supreme Court?

LIST OF PARTIES

The parties to the proceeding below were:

Susan M. Weichert, Petitioner; and

William J. Brouse, Treasurer of the County of Oswego, Respondent.[1]

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1. As of December 31, 2001, William J. Brouse retired as Oswego County Treasurer. On January 1, 2002, John W. Kruk of Fulton, New York, became his duly-elected successor as Oswego County Treasurer.

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Statutes:

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STATEMENT OF FACTS

The Respondent, Oswego County Treasurer and the County Attorney were served with a copy of the within signed Order to Show Cause with restraining provisions, summons, complaint, and annexed exhibits (R.9-26) on September 18, 2000 (R.27, 28).

The aforementioned papers were captioned "*Susan M. Weichert, Plaintiff v. William J. Brouse, Oswego County Treasurer, Defendant*" and bear Oswego County Clerk's Index Number 00-1692. While captioned as an action, this matter seeks relief, such as mandamus to compel, which would otherwise be limited to a special proceeding.

The Order to Show Cause was signed on September 13, 2000 (R.11) according to the Petitioner; the county is unaware as to the exact date of signing, although the face of the order reads August 13, 2000. Petitioner purchased an Index Number and RJI until September 11, 2000 (R.6-8), the same day that the Summons is dated (R.13). The Complaint is dated on August 25th, 2000 (R.19) and is verified on August 31st, 2000 (R.12, 20).

After issue was joined, the Respondent interposed an Answer with various affirmative defenses and exhibits (R.29-47) The first affirmative defense contained therein was that the within proceeding was not properly commenced and, accordingly, *in personam* and subject matter jurisdiction were lacking over Respondent. (R.30-31). In support of said defense, the Respondent also provided to the Court an affidavit from the Oswego County Clerk (R.37) stating that, as of the September 20, 2000, there were no pleadings filed under Index Number 00-1692, including, but not limited to an Order to Show Cause, Summons or Complaint.

This matter came before a Motion Term of New York State Supreme Court, Oswego County, on September 22nd, 2000, before the Hon. Robert J. Nicholson, J.S.C. Petitioner, through counsel, appeared on behalf of the relief sought in the Order to Show Cause and the Respondent, through counsel, appeared in opposition thereto. The Court found that none of the aforementioned pleadings had been filed with the Oswego County Clerk under Oswego County Index Number 00-1692 and were not filed at the time of service upon the Respondent. (R.1-2) The Court also found that subject matter and *in personam* jurisdiction were absent and dismissed this matter *without prejudice* on September 22, 2000 (R.2) The Court did not reach the merits of the underlying action/proceeding. The Order granting the dismissal was signed November 9th, 2000 and was entered with the Oswego County Clerk on November 15th, 2000 (Petition at Appendix D-1, R.3).

Petitioner appealed to the New York State Supreme Court, Appellate Division, Fourth Department which affirmed the Order of Supreme Court, Oswego County on November 9th, 2001 (Petition at Appendix B1, B2 and C1).[2] Petitioner then moved for leave to appeal before the New York State Court of Appeals within the time provided for by statute. By a decision dated January 10th, 2002, the New York State Court of Appeals denied Petitioner's motion for leave to appeal.[3] (Petition at Appendix A-1).

The within Petition for a Writ of Certiorari followed.

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2. *Matter of Weichert v. Brouse*, 288 A.D.2d 841 (Mem.), 732 N.Y.S.2d 186, 2001 N.Y. *Slip. Op.* 08586.

3. *Matter of Weichert v. Brouse*, 97 N.Y.2d 608, 765 N.E.2d 301, 739 N.Y.S.2d 98.

REASONS FOR DENYING THE WRIT

The Respondent would submit that the sole question which should be considered by this Honorable Court is whether or not the underlying proceeding was properly commenced by filing in the first instance and thereby conferring *in personam* and subject matter jurisdiction; the Respondent would respectfully submit that the Courts below have correctly and consistently answered this question in the negative.

The Petition for a Writ of Certiorari now before this Honorable Court attempts to craft a proceeding where one has never actually existed. Petitioner alleges that there have been constitutional violations meriting a review of this Honorable Court. The Petition makes conclusory and misleading allegations regarding the role of the Oswego County Attorney's Office and the Oswego County Clerk in this proceeding. In its simplest form, this case was dismissed on procedural grounds, without prejudice, and that dismissal has been upheld by all New York State Courts before which it was raised. The significant time and effort spent upon perfecting the various appeals herein would have been better-utilized by Petitioner in properly commencing a proceeding within the applicable statute of limitations.

As the New York Courts below have found that there was no subject matter jurisdiction or *in personam* jurisdiction over the Respondent because of the failure to properly commence this proceeding under state law, no important federal questions or constitutional concerns have been raised which would require issuance of the Writ.

Simply, no federal question has been raised by the instant proceeding in a way that it conflicts with the decision of another state court of last resort or the United States Court of Appeals. By declining to grant leave to appeal, the New York State Court of Appeals has merely affirmed itself on a matter of state law only regarding the commencement of special proceedings in the state courts of New York.

Petitioner has averred that there are constitutional violations meriting the review of this Court; these are nothing but bare allegations made by Petitioner and are denied by Respondent. Any property alleged to have been taken for delinquent taxes was properly foreclosed by way of a separate, *in rem* proceeding in New York State Supreme Court which has not otherwise been appealed and is now time-barred. (Petition at 15). Petitioner misstates the holding of the New York State Supreme Court, Appellate Division, Fourth Department in *Matter of Robert M. Weichert v. Brouse*[4]; there, it was affirmed that Robert M. Weichert, only, did not have standing and no other matters were reached. Consistently, in this matter, the Courts of the State of New York have found that jurisdiction is absent and, as such, the within Petition should be denied.

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4. *Matter of Robert M. Weichert v. Brouse*, 720 N.Y.S.2d 77, 278 A.D.2d 952, 2000 N.Y. *Slip Op.* 11515, *lv. to appeal den.*, 725 N.Y.S.2d 278.

I.

PETITIONER HAS NOT ALLEGED ANY COMPELLING REASONS FOR ISSUANCE OF THE WRIT

The Rules of this Court state that the Court will grant a petition for a writ of certiorari "*only for compelling reasons.*" Sup. Ct. R. 10 As regards the state court decision denying leave for appeal to the New York State Court of Appeals, Rules 10(b) and 10(c) describe the "*character of the reasons the Court considers*," which read, in pertinent part, as follows:

> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;*
>
> *(c) a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.* Supreme Court Rule 10.

Petitioner did not file the relevant pleadings with the Oswego County Clerk prior to commencing this proceeding as is a substantive and necessary condition precedent to the exercise of judicial authority in New York State superior courts. New York State Supreme Court, Oswego County, in dismissing the proceeding without prejudice, held that *in personam* and subject matter jurisdiction were absent in the underlying proceeding because of Petitioner's failure to

file the initiatory papers. (Petition Appendix at D2). New York State Supreme Court, Appellate Division, Fourth Department, affirmed the Order of the Hon. Robert J. Nicholson, J.S.C. and also found that the complaint was properly dismissed for lack of *in personam* and subject matter jurisdiction.[5]

Petitioner then applied for leave to appeal to the New York State Court of Appeals. Respondent filed a copy of its Appellate Division brief with the Court in opposition thereto. On January 10th, 2002, the New York State Court of Appeals denied Petitioner's motion for leave to appeal.[6] It should be noted that the Appellate Division's November 9th, 2001 decision relied upon two prior cases from the New York Court of Appeals as authority for its decision.[7]

The within Petition followed. While Petitioner's application makes many bare and conclusory allegations in an attempt to couch the Respondent's actions as violative of the United States Constitution and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L. Ed. 2d 180, 103 S. Ct. 2706, the Respondent's actions were never reached or reviewed in the underlying proceeding. This, notwithstanding, the Respondent would deny that his actions were violative of the Petitioner's constitutional rights and applicable state law. The separate, 1998 *in rem* tax foreclosure proceeding (Petition at 5) has not been appealed,

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5. *Matter of Weichert v. Brouse*, 288 A.D.2d 841 (Mem), 732 N.Y.S.2d 186, 2001 N.Y. Slip. Op. 08586.

6. *Matter of Weichert v. Brouse*, 97 N.Y.2d 608, 765 N.E.2d 301, 739 N.Y.S.2d 98.

7. *Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330; *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 719-720.

was not preserved for appeal and is not before the Court despite Petitioner's contentions. As the underlying proceeding was properly dismissed on jurisdictional grounds, without prejudice, there are no compelling reasons for this Honorable Court to grant the Writ as there is neither a federal question nor a conflict of authority.

II.

PETITIONER DID NOT PROPERLY FILE ANY OF THE INITIATORY PLEADINGS HEREIN; ACCORDINGLY, NO ACTION OR PROCEEDING WAS COMMENCED AND SUBJECT MATTER AND *IN PERSONAM* JURISDICTION ARE ABSENT

Although the record on appeal and the Petition contain many conclusory allegations about how the Oswego County Clerk's Office works, Petitioner's entitlement to tax deeds, damages and the alleged lack of constitutional notice in a separate, *in rem* tax foreclosure proceeding, the sole issue before this Court is very concise and simple: "*Was the underlying proceeding properly commenced by filing?*"

Since 1992, the actions and proceedings in New York State Supreme Court have been governed by a commencement-by-filing statute, CPLR § 304. CPLR § 304 reads, in pertinent part, as follows:

> *An action is commenced by **filing** a summons and complaint or summons with notice. A special proceeding is commenced by **filing** a notice of petition or order to show cause and a petition . . .*

(Emphasis supplied) McKinney's Civil Practice Law and Rules § 304.

Here, despite the contentions of the Petitioner, the unequivocal proof contained in the Order appealed herein (R.1-2), and the affidavit of the Oswego County Clerk (R.37) clearly demonstrates that no Order to Show Cause, Summons or Complaint were filed under Index Number 00-1692 at the time of service upon the Respondent. Without strict compliance with the applicable statutory provisions, there can be no action or proceeding and, accordingly, no subject matter jurisdiction or *in personam* jurisdiction over the Respondent herein.

The duly interposed answer (R.29-47) of the Oswego County Treasurer raised several affirmative defenses, including procedural commencement-by-filing and jurisdictional defenses (R.30-31), so that any objections to procedural compliance and *in personam* jurisdiction have not previously been waived and have been preserved for appeal.[8] The limited appearance for the purposes of this application should not be construed as a consent to *in personam* jurisdiction over Respondent in the underlying proceeding.

The Petitioner is adamant that the purchase of a time-stamped index number application and RJI constitutes a "filing" for the purposes of CPLR § 304. Perhaps as a safeguard the drafters of CPLR § 304 also required that any papers filed with the clerk, be date stamped, and a copy returned. That provision continues, in part, as follows:

> *. . . At the time of filing, the* ***filed papers shall be date stamped by the clerk*** *of the court who shall file them and maintain a record of the date of the filing* ***and who shall return forthwith a date***

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8. *Venditti v. Town of Alden*, 239 A.D.2d 910, 659 N.Y.S.2d 628 (4th Dept. 1997).

> ***stamped copy**, together with an index number, to the filing party . . .*[9] (Emphasis supplied)

It should be noted that none of the initiatory papers contained in the Record on Appeal, to-wit: the Order to Show Cause (R.9), the Summons (R.13) or the Complaint (R.14), have been date-stamped by the Oswego County Clerk. Moreover, the Oswego County Clerk, upon reviewing his file, has found no pleadings whatsoever filed under the within index number (R.37).

It is undisputed that the Petitioner purchased an index number, for, if she hadn't, there would not be an index number for this action in the first instance. However, a mere index number application does not a filing make. According to the above-referenced provision of CPLR § 304, a date-stamped pleading would be *prima facie* proof of filing; therefore, an adverse inference should be drawn against Petitioner as she has been unable to produce any initiatory pleadings so endorsed by the clerk, nor are there any such papers in the county clerk's file or contained in the record on appeal.

On September 20th, 2000, the Oswego County Clerk personally examined the file maintained by his office for Index Number 00-1692 and found "*. . . no pleadings filed under said index number including, but not limited to, a summons and complaint and an order to show cause (signed or unsigned) . . .*" according to the affidavit of George J. Williams, County Clerk, of even date. (R.37) The clerk also noted that no notice of pendency or notice of claim had been filed for this action (R.37).

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9. McKinney's New York Civil Practice Law and Rules § 304.

Despite Appellant's strenuous contentions to the contrary, it is indeed possible to purchase an index number and RJI *without* first filing any papers with the Oswego County Clerk. Apparently, that is what the Petitioner did in the instant action as the Request for Judicial Intervention (RJI) and Index number application are date-stamped. However, obtaining an index number, paying the requisite fee and purchasing an RJI are not tantamount to "filing" pleadings with the County Clerk or the commencement of an action or proceeding for the purposes of CPLR § 304.

In light of same, Supreme Court, Oswego County, (Hon. Robert J. Nicholson, J.S.C.) in dismissing this action, and upon reviewing the affidavit of the Oswego County Clerk (Petition Appendix at D2-D3, R.37), held that

> *. . . it appearing to the Court that* ***none of the aforementioned pleadings have been filed with the Oswego County Clerk under the above-referenced index number, nor were they filed at the time of the service of same upon Respondent as is a substantive and necessary condition precedent to the exercise of judicial authority****, and it further appearing to the Court that in personam jurisdiction over the Respondent and subject matter jurisdiction are, accordingly, absent . . . it is hereby . . . ORDERED that the within Order to Show Cause and Complaint are hereby dismissed, in their entirety, without prejudice.* (Emphasis supplied) (Petition Appendix at D2-D3, R.2).

Moreover, as Petitioner contends, the Office of the County Attorney has not ". . . *formulated and implemented . . . the procedures and policy . . .*" of the Oswego County

Clerk. (R.4) The Oswego County Clerk, George J. Williams, has been County Clerk for approximately 22 years and is responsible for formulating his own policies and procedures, and does so of his own accord, in accordance with state law and upon the advice of the Court, the NYS Association of County Clerks and this office.

The Oswego County Clerk will routinely sell Index Numbers and RJIs without any papers being "*filed*" contemporaneously therewith. For injunctions and show cause orders, many practitioners, including this one, will purchase an index number and RJI and walk the RJI and unsigned order to show cause over to the Oswego County Court House, right next door. This ensures receipt by the Court Clerk's Office for transmittal to the *ex parte* Justice and, in the event of a stay or injunction, as is the case here, allows a more timely issuance/denial of the injunction. Upon return of a signed Order to Show Cause to the applicant by Supreme Court Chambers, the normal practice is that the signed pleadings are then filed with the County Clerk, and a date-stamped copy returned to the applicant prior to service — something which obviously did not occur here. Especially if statute of limitations concerns are implicated, the safer course would be to file a notice of petition/summons and petition/complaint first, and seek a show cause order later, something which also did not occur in the instant matter.

Assuming, *arguendo*, that the county clerk's office staff placed the unsigned Order to Show Cause, RJI and supporting papers to a Supreme Court Clerk in inter-office mail upon the purchase of an index number and RJI that act, alone, does not constitute a "filing" as the papers are not filed at that time and because an unsigned Order to Show Cause is of no jurisdictional effect.

Here, the Petitioner opted to proceed by an Order to Show Cause, Summons and Complaint, although this appears to be a hybrid action/special proceeding. Petitioner is seeking damages for breach of contract, to annul the issuance of a tax deed, mandamus to compel the Respondent to issue a deed, quiet title and other relief in one action/proceeding (R.18-19). Some of the apparent relief sought falls under Article 78 of the CPLR, Article 15 of the Real Property Actions and Proceedings Law and Article 11 of the Real Property Tax Law, and would, by necessity, be brought in a special proceeding, not an action.

To the extent that an initiatory Order to Show Cause is also involved herein, the commencement of the instant case is not at all inapposite to *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714. In *Fry*, Judge Ciparick aptly held that:

> *[s]ince an unexecuted order to show cause is of no legal effect (c.f. CPLR§2214[d], 2219[a]), its filing did not satisfy the provision of the commencement-by-filing statute requiring petitioner to file an order to show cause or a notice of petition alone with the petition . . . Therefore,* ***petitioner's failure to file the proper papers with the clerk of the court, and the attendant failure to commence the special proceeding, rendered the proceeding subject to dismissal.***[10] (Emphasis supplied)

Thus, Petitioner, if correct in its assertions, would have had to file both an unexecuted Order to Show Cause with a Summons and Complaint to "commence" the action and then file an executed copy thereof to comply with *Fry*, *supra*.

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10. *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 717. *See also Matter of Gershel v. Porr*, 89 N.Y.2d 327, 332; *Matter of Vetrone v. Mackin*, 216 A.D.2d 839, 841.

If that did, in fact, occur, surely the Court, the Oswego County Clerk or the Respondent would have time-stamped pleadings in their possession, something which are markedly absent in this case.

Under the new commencement-by-filing provisions in CPLR § 304 "*service of process without **first paying the filing fee and filing the initiatory papers is a nullity**, the action never having been properly commenced*" in the first instance.[11] (Emphasis supplied). While the index number fee was paid in the instant matter, the papers, simply, were never filed with the County Clerk. (R.37).

Since a court cannot exercise subject matter jurisdiction over a matter which has not properly been brought before it, or personal jurisdiction over hypothetical parties, compliance with the commencement-by-filing system is a "*substantive and necessary condition precedent to the exercise of judicial authority.*" *Id.* at 725.

Here, Petitioner purchased an index number, but did not file the summons, complaint or order to show cause (signed or unsigned) (R.37). Service of a summons and complaint without purchasing an index number does not "commence" an action under CPLR § 304.[12] It would seem to follow, then, that purchasing an index number but not filing a summons and complaint (or show cause order) thereunder, as is the case here, would also not "commence" an action unless and until the pleadings are first filed and secondly served.

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11. *Matter of Fry v. Village of Tarrytown*, *supra*, 89 N.Y.2d 714, 719, *citing Gershel v. Porr*, 89 N.Y.2d 327, 330.

12. *Saunders v. Central Brooklyn Coordinating Council, Inc.*, 273 A.D.2d 294, 708 N.Y.S.2d 709 (2d Dept. 2000).

The courts of this State have clearly held that an action is now "commenced" when a summons is filed.[13] To hold otherwise would turn CPLR § 304 upside down and create severe statewide problems as to exactly when an action was actually "commenced" for statute of limitations purposes.

To the extent that the underlying proceeding appears to be a hybrid action/ special proceeding, the same rule applies for the commencement of a special proceeding and the filing of the Order to Show Cause, Petition or Notice of Petition; it is quite clear that the papers must be *filed* with the clerk to *commence* the proceeding.[14]

Where service of process is accomplished without filing, the resulting proceeding is a nullity, it not having been properly commenced, and such non-filing constitutes a non-waivable jurisdictional defect.[15]

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13. *Rybka v. New York City Health and Hospital Corp.*, 263 A.D.2d 403, 404, 693 N.Y.S.2d 566 (1st Dept. 1999); *see Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 675 N.E.2d 836 (1996).

14. *See* CPLR § 304; *Matter of Spodek v. New York State Commissioner of Taxation & Finance*, 85 N.Y.2d 760, 763, 628 N.Y.S.2d 256, 651 N.E.2d 1275.

15. *Matter of Parkinson v. Leahy*, 277 A.D.2d 810, 811, 716 N.Y.S.2d 752, 754 (A.D. 3d Dept. 2000); *Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 675 N.E.2d 836; *Connolly v. Chenot*, 275 A.D.2d 583, ___, 712 N.Y.S.2d 234, 237.

III.

PETITIONER AVERS THAT THE ORDER TO SHOW CAUSE WAS TIME-STAMPED; THIS IS UNSUPPORTED BY THE RECORD ON APPEAL

In her Brief on Appeal to the Appellate Division, Fourth Department, Petitioner averred that ". . . *the time stamp on the order to show cause, the signature of the Hon. John J. Elliott on the order to show cause clearly show and indicate that Petitioner/appellant did file and record the application for order to show cause . . . with the Oswego County Clerk on September 11, 2000.*" (Petition at 7, Petitioner's Brief on Appeal to the Appellate Division, Fourth Department, pp. 4-5).

The Order to Show Cause contained in the Record on Appeal (R.9-11) and as presented before the lower courts is clearly devoid of any time stamp or other endorsement from the Oswego County Clerk, as are the underlying summons and complaint. Additionally, Petitioner's affidavits of service do not contain a time-stamp from the clerk. (R.27-28).

Appellate review of this matter was limited in the state courts to the record made before Supreme Court, Oswego County.[16] To date, Petitioner has yet to produce a single pleading which has been time-stamped by the Oswego County Clerk or to rebut the County Clerk's sworn affidavit (R.37) that there are no pleadings filed under Index Number 00-1692. Respondent Brouse would respectfully submit that the determination of Supreme Court, Oswego County (R.1-2) as

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16. *Matter of Bligen v. Kelly*, 126 A.D.2d 989, 511 N.Y.S.2d 985 (4th Dept. 1987); *Hughes v. Nussbaumer, Clarke & Velzy*, 140 A.D.2d 989, 529 N.Y.S.2d 726 (4th Dept. 1988).

based, in part, upon the affidavit of the Oswego County Clerk (R.37), should control as to what papers were or were not filed, as Petitioner's allegations on appeal as to time-stamped pleadings are unsupported by the appellate record.

The dismissal for failure to comply with the commencement-by-filing rules as outlined in the Order of the Honorable Robert J. Nicholson, J.S.C (Petition Appendix D-1, R.1) and the Affidavit of the Oswego County Clerk (R.37) are presumptive evidence that no pleadings were indeed filed in the within proceeding with the Oswego County Clerk.

Petitioner's prior attempts to argue that the "*. . . lower court should have reconstructed any missing papers from Petitioner's and Respondent's files; should have investigated the whereabouts of the original papers filed, and of the circumstances of their disappearance while in the hands of the Combined Court System . . .*" (Petitioner's Brief on Appeal to the Appellate Division, Fourth Department, page 5) were neither originally requested at the return date of the Order to Show Cause nor are supported by the record on appeal. Petitioner cannot properly raise new facts on appeal. If Petitioner did indeed have time-stamped pleadings from the Oswego County Clerk, she has neglected to produce them at the return date of the Order to Show Cause, on the return date of the First Restoral and has neglected to include them her record on appeal before the New York State Courts; she is now foreclosed on the record from producing same. *Id.*

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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